Supreme Court, U.S.
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No. 93-1846

In The

Supreme Court of the United States

October Term, 1993

DENNIS MARK, *et al.*,

Cross-Petitioners,

vs.

MICHELLE CORWIN, Registrar of Voters for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,

Cross-Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

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QUESTION PRESENTED

Should this Court grant certiorari to "clarify" or "reinterpret" its three-year-old decision in *Renne v. Geary*, 501 U.S. 312 (1991), particularly in a case in which the Court of Appeals correctly applied *Renne* and found non-justiciable the controversy the Cross-Petition seeks to revive?

LIST OF ALL PARTIES

Although the "Questions Presented" in the Cross-Petition do not include any question relating to the case of *Mark v. Corwin*, the Cross-Petition's "List of All Parties" includes parties from that case, as well as from the related case of *Geary v. Renne*. In addition, the body of the Cross-Petition obliquely argues issues from the second claim for relief in *Mark v. Corwin*. Accordingly, even though issues from *Mark v. Corwin* have not been properly presented in the Cross-Petition, for the Court's information, Cross-Respondents Louise H. Renne and the City and County of San Francisco, *et al.* ("San Francisco"), list below the parties from *Mark v. Corwin* as well as those in *Geary v. Renne*.

In *Geary*, Cross-Petitioners Melissa Gudrun, Wayne Johnson, David Soule, Peter Johnson, and Robert Gebert are residents and registered voters of the City and County of San Francisco. (Original complainants Bob Geary, Terence Faulkner, Robert Silvestri, Max Woods and Dennis Mark were dismissed from the action and are not parties to the Cross-Petition.)

Cross-Petitioner Election Action is an organization dedicated to placing measures on the ballot by initiative, and campaigning for and against ballot measures. Cross-Petitioner Sudi Trippet is coordinator of Election Action. The *Geary* complaint does not allege that Trippet is a resident or registered voter of San Francisco, or that Election Action includes any residents or registered voters of San Francisco.

LIST OF ALL PARTIES – Continued

Cross-Respondent Louise H. Renne is the City Attorney for the City and County of San Francisco. Cross-Respondent Jay Patterson is a former Registrar of Voters of the City and County of San Francisco; Cross-Respondent Dianne Feinstein is a former Mayor of San Francisco; Cross-Respondent San Francisco Board of Supervisors is the governing body of the City and County of San Francisco. Cross-Respondent City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. The City and County is responsible for conducting federal, state and local elections within its jurisdiction.

In *Mark*, complainants Dennis Mark, Bob Geary, Robert Silvestri, Max Woods, Alexa Smith and Terence Faulkner are residents and registered voters of the City and County of San Francisco.

Michelle Corwin is a former Registrar of Voters of the City and County of San Francisco. Other Cross-Respondents, identified above, are Louise Renne and the City and County of San Francisco.

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DENNIS MARK, *et al.*,

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On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

OPINIONS BELOW

The *en banc* Order of the Court of Appeals for the Ninth Circuit ("the Order") is reported under the name *Geary v. Renne* at 2 F.3d 989 (1993), reprinted in Appendix A to the City and County of San Francisco's Petition for Certiorari in *Corwin v. Mark*, No. 93-1846 ("Petition for Certiorari"), p. A-1.

The initial Ninth Circuit panel's opinion is reported under the name *Geary v. Renne* at 914 F.2d 1249 (1990), reprinted in Appendix B to the Petition for Certiorari, p. B-1. The order granting the petition for rehearing of

Cross-Petitioners and setting a rehearing *en banc* is reported at 924 F.2d 175, reprinted in Appendix C to the Petition for Certiorari, p. C-1.

The order of the United States District Court for the Northern District of California (Zirpoli, D.J.) is unpublished and is reprinted in Appendix D to the Petition for Certiorari, p. D-1.

JURISDICTION

Cross-Petitioners Bob Geary, Sudi Trippet, *et al.* ("Trippet"), brought the action entitled *Geary v. Renne* on September 11, 1987, in the United States District Court for the Northern District of California.[1] The complaint sought relief under 42 U.S.C. §§1983 and 1985.

The *Geary* complaint set forth three claims. Only the first claim is at issue here. It challenged the constitutionality of California Elections Code §§3795 and 5025. The second claim was dismissed by the district court and the dismissal was not appealed. The third claim, also not at issue, challenged Article II, §6(b) of the California Constitution. The third claim reached this Court separately three years ago, when the claim was held nonjusticiable. *Renne v. Geary*, 501 U.S. 312 (1991).

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[1] We refer collectively to the Cross-Petitioners as "Trippet" rather than "Geary" because the district court dismissed Geary (and four of the other original complainants) from this action in 1987. *See* p. 7 *post*.

On August 30, 1988, Cross-Petitioners Dennis Mark, *et al.* ("Mark"), brought a different action, *Mark v. Corwin*, in the Northern District of California, involving related claims. The *Mark* complaint also sought relief under 42 U.S.C. §§1983 and 1985.

Mark's complaint set forth two claims. The first claim, which challenged the application of California Elections Code §10012, is at issue in San Francisco's Petition for Certiorari, but not in this Cross-Petition. The second claim, which Mark may have intended to put at issue here, challenged the constitutionality of California Elections Code §10013.5.[2]

The district court's jurisdiction in both *Geary* and *Mark* was based on 28 U.S.C. §§1331 and 1343. The district court consolidated the cases, and, on April 28, 1989, held unconstitutional all of the challenged Elections Code statutes.

On the City's appeal, the Ninth Circuit had appellate jurisdiction under 28 U.S.C. §1291. A unanimous panel reversed the district court's judgment as to each statute. *See* Appendix B to Petition for Certiorari.

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[2] The "Questions Presented" in the Cross-Petition do not raise any issue relating to the second claim in *Mark*. At the same time, the body of the Cross-Petition intermittently refers to §10013.5, the statute at issue in that claim. Thus, it appears that Mark may have intended to seek this Court's review of the Ninth Circuit's judgment dismissing the second claim for relief in *Mark*. Out of caution, San Francisco includes in this Opposition the reasons why this Court should not grant such review.

Following Trippet's and Mark's successful petition for *en banc* review, and following this Court's decision in *Renne v. Geary*, 501 U.S. 312 (1991), the City requested leave to brief the issue of the justiciability of all of the claims in the two cases.

By letter-brief of May 24, 1993, the City challenged the standing of Trippet and the other complainants who remained in the *Geary* action, since none had submitted ballot arguments for inclusion in the San Francisco Voter's Information Pamphlet ("the voter's pamphlet"). As to the second claim in the *Mark* action, the City pointed out that the controversy was moot, since it arose from a 1986 election and the complaint was not filed until 1988. The *en banc* court's September 1, 1993 Order held that both claims were nonjusticiable. *See* Appx. A to Petition for Certiorari, p. A-1.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. California Elections Code §§3795 and 5025 provide in pertinent part as follows:

> During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the materials [in the voter's pamphlet] to be amended or deleted. A peremptory writ of mandate or an injunction shall be issued only upon

> clear and convincing proof that the material in question is false, misleading or inconsistent with the requirements of this chapter. . . . [3]

2. California Elections Code §10013.5 provides in pertinent part as follows:

> Not less than 10 calendar days before the clerk submits the official voter's pamphlet referred to in Section 10012 for printing, the clerk shall make a copy of the voter's pamphlet available for public examination in the clerk's office. . . .
>
> During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the material in the voter's pamphlet to be amended or deleted. A peremptory writ of mandate or an injunction shall issue only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. . . .

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[3] California Elections Code §§3795 and 5025 are identical provisions, one applying to cities and the other to counties. Because San Francisco is both a city and a county, both provisions are implicated here. All statutory references are to the California Elections Code.

3. The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Trippet and 11 other complainants filed the *Geary* action on September 11, 1987. The complaint included three claims for relief, only the first of which is at issue here.

The first claim alleged that in connection with the November 3, 1987 election, five of the 12 complainants – Geary, Faulkner, Silvestri, Woods and Mark – submitted ballot arguments for publication in the voter's pamphlet.[4] Ballot arguments are statements submitted to the Registrar of Voters taking positions for or against legislative measures to be voted upon by the electorate. The voter's pamphlet is an educational tool for voters, published

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[4] The *Geary* complaint also alleged that plaintiffs Geary, Silvestri and Faulkner submitted ballot arguments in connection with the *June 1987* municipal election. *See Geary* complaint, ¶12, reprinted in the Cross-Petition, p. 3-A. This dispute, however, was not live when the action was filed in September 1987, three months *after* the June election had occurred. *See* pp. 16-17 *post*.

before each election by the government and sent to all registered voters in the jurisdiction. *See* §10012(b).

The *Geary* complaint's first claim alleged that pursuant to California Elections Code §§3795 and 5025, San Francisco's Registrar of Voters had gone to state court and obtained orders deleting false and misleading statements in ballot arguments before they were published in the voter's pamphlet. Sections 3795 and 5025 state that before a ballot argument is published in a voter's pamphlet, a registrar (or any voter) may seek a judicial order deleting or amending statements that are false, misleading or inconsistent with the requirements of the California Elections Code. Before the material may be ordered amended or deleted, the registrar must prove to the court by clear and convincing evidence that the statement is factually false, misleading or inconsistent with legal requirements.

On October 27, 1987, the district court dismissed plaintiffs Geary, Faulkner, Silvestri, Woods and Mark because they were parties in an identical state court action, *Patterson v. Board of Supervisors*, 202 Cal.App.3d 22 (1988). The dismissal was not appealed. Thus, the only complainants left in the action were an association, Election Action, and six individuals who, according to the complaint, "desire to read ballot arguments in their uncensored form." *See Geary* complaint, ¶17, reprinted in Cross-Petition, p. 3-A. In other words, none of the remaining complainants had submitted ballot arguments in connection with the November 1987 election.

On April 21, 1988, the district court temporarily abstained from further considering the first claim for relief pending resolution of the *Patterson* case.[5]

On August 30, 1988, almost a year after the complaint in *Geary* was filed, Dennis Mark and five other complainants filed a related action, *Mark v. Corwin*. Mark's first claim for relief is at issue in San Francisco's Petition for Certiorari but is not at issue in the Cross-Petition. Mark's second claim for relief challenged the constitutionality of §10013.5.

The second claim alleged that in connection with the 1986 general election, the City invoked §10013.5 to obtain a court order deleting portions of a candidate's statement submitted for publication in the voter's pamphlet. *Mark* Complaint, ¶20; the *Mark* Complaint is reprinted as Appx. E to the Petition for Certiorari, p. E-1. A candidate's statement is a statutorily authorized, 200-word statement of qualifications by candidates for nonpartisan office.[6] *See* §10012(a). The *Mark* complaint alleged, among other things, that §10013.5 violates the First Amendment because the statute authorizes invalid prior restraints on expression.

Following the California Court of Appeal's decision in *Patterson*, the district court consolidated the first claim in *Geary* with the *Mark* action.

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[5] Because of this temporary abstention as to the first claim, the district court ruled separately on the third claim, which ultimately proceeded on its own to this Court. *Renne v. Geary*, 510 U.S. 312.

[6] County, city, school, and judicial offices in California are nonpartisan. Cal. Const., art. II, §6(a); Cal. Elec. Code §37.

On April 28, 1989, the district court granted Trippet's motion for summary judgment on her first claim in the *Geary* action and Mark's motion for summary judgment on his second claim for relief. *See* Appx. D to Petition for Certiorari, p. D-10. Judge Zirpoli held that §§3795, 5025 and 10013.5 violated the First Amendment because they permitted courts to amend or delete false statements in ballot arguments and candidate's statements without requiring "actual malice" on the part of the authors. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); Appx. D to Petition for Certiorari, p. D-6.

The City filed its notice of appeal on May 2, 1989.

On September 14, 1990, a three-judge panel of the Ninth Circuit issued a unanimous opinion reversing the district court's judgment. *Geary v. Renne*, 914 F.2d 1249; Appx. B to Petition for Certiorari, p. B-16. The court distinguished *Times v. Sullivan* on the grounds that (1) the statutes at issue here do not suppress protected expression because false and misleading statements are not prohibited generally but only in the voter's pamphlet, and (2) the authors do not have a protected interest in publishing false or misleading statements in the pamphlet. *Geary v. Renne*, 914 F.2d at 1254; Appx. B to Petition for Certiorari, p. B-13.

The panel also reversed the district court's grant of summary judgment to the complainants in *Mark*, 914 F.2d at 1251; Appx. B to Petition for Certiorari, p. B-16.

Trippet and Mark petitioned for *en banc* review. On January 30, 1991, the Ninth Circuit granted the petition. 924 F.2d 175; Appx. C to the Petition for Certiorari.

Following a lengthy stay of the appeal pending resolution of two similar cases in the California Supreme Court, in April 1993, San Francisco asked the *en banc* court for permission to brief issues of justiciability in light of *Renne v. Geary*, 501 U.S. 312. The court granted the request.

In its May 24, 1993 letter-brief, the City asserted that Trippet and the other remaining complainants in *Geary* lacked standing to challenge §§3795 and 5025 because none had actually submitted ballot arguments for inclusion in the voter's pamphlet. As to the second claim in *Mark*, the City pointed out that under *Renne*, the controversy was moot because it arose from an election that had occurred nearly two years before the complaint was filed. A copy of the City's May 24, 1993 letter-brief setting forth these arguments is reprinted as Appendix F to the Petition for Certiorari.

On June 24, 1993, at the hearing before the *en banc* court, Trippet argued that she and an organization known as Election Action had submitted ballot arguments in connection with the June 1988 municipal election in San Francisco. Trippet asserted that these arguments were the subject of judicial censoring and therefore that she and Election Action had standing in *Geary*, which was filed in September 1987.

On July 21, 1993, San Francisco filed with the Ninth Circuit a letter responding to this new assertion. The letter pointed out that the ballot arguments submitted by Election Action and Ms. Trippet related to an entirely different election and an entirely different controversy than those alleged in the complaint. The letter also

emphasized that under *Renne*, it was too late to supplement the complaint: "A supplemental complaint *in 1993* alleging that appellees Trippet and Election Action submitted ballot arguments before the June 1988 election would not set forth a live controversy, since a court could not longer grant any relief with respect to that election. *See Renne v. Geary*, [501 U.S. 316, 320-321 (1991).]" A copy of San Francisco's July 21, 1993 letter is reprinted as Appendix A to this Opposition.

On September 1, 1993, the eleven-judge *en banc* court issued its summary Order. 2 F.3d at 990; Appx. A to Petition for Certiorari, p. A-3. With respect to the first claim in *Geary* and the second claim in *Mark*, the court ordered "that the judgments are vacated and the cases are remanded without prejudice for lack of a justiciable controversy. . . . " *Ibid.*

On September 14, 1993, the Cross-Petitioners sought a rehearing. On December 16, 1993, the *en banc* court denied the petition.

On March 15, 1994, San Francisco filed its Petition for Certiorari in *Corwin v. Mark*, No. 93-1550, seeking review of the Ninth Circuit's judgment as to the first claim for relief in that action. On April 18, 1994, Trippet filed this Cross-Petition.

REASONS FOR DENYING THE WRIT

A. The Court Should Not Grant Certiorari To "Clarify" Or "Interpret" A Three-Year-Old Decision Which Speaks Clearly For Itself.

The Cross-Petition in this case asks the Court to grant certiorari in order to "clarify" what the Court meant in *Renne v. Geary*, 501 U.S. 312, a case brought by the same complainants and decided against them a mere three years ago. *See* Cross-Petition, pp. 4, 5, 6, 9 and 12. The Cross-Petitioners do not assert that the Ninth Circuit's decision conflicts with *Renne*. Rather, they appear unhappy with what *Renne* says, and ask the Court now to reinterpret or change it. Thus, for example, the Cross-Petition states:

> The obvious problem with a case-by-case determination whether those who complain about censorship have standing to do so is that fewer cases will be decided on the merits. . . . If the Court did not intend this result, it should make itself more clear.

Cross-Petition, p. 5.

Plainly, this Court does not grant certiorari to issue "clarifications" of recently rendered decisions. The *Renne* opinion speaks for itself. Even more plainly, there is no need for the Court to take its time to restate the obvious principles (1) that standing is necessarily determined on a case-by-case basis, (2) that defective pleadings result in cases not being decided on the merits, or (3) that the rules of justiciability apply to all federal cases, including those alleging improper censorship.

B. The Court Should Not Grant Certiorari Because The Ninth Circuit's Decision As To The First Claim In *Geary* And the Second Claim In *Mark* Is Correct.

Certiorari here is not warranted for another basic reason: The Ninth Circuit correctly decided that both claims at issue here were nonjusticiable.

1. The Remaining Complainants In *Geary* Lack Standing.

As to *Geary*, the Ninth Circuit accepted the City's argument that the remaining complainants lacked standing to challenge §§3795 and 5025. That argument was based on *Renne*. There, wholly apart from doubts about the redressability of the complaint, this Court questioned the right of the complainants to "stand in the shoes" of nonpartisan candidates who wished to have published in the voter's pamphlet the fact that a political party had endorsed them:

> Nor is it clear, putting aside our concerns about redressability, that the committee members have third party standing to assert the rights of candidates, *since no obvious barrier exists that would prevent a candidate from asserting his or her own rights. See Powers v. Ohio*, 499 U.S. 400, 414-415 (1991).

Renne, 501 U.S. at 320 (emphasis added.).

The same reasoning applies here. No obvious barrier exists that would prevent the author of a ballot pamphlet from asserting his or her own rights.

Moreover, there is nothing in the statutes at issue here that deters would-be authors of ballot arguments. Like the challenged provision in *Renne*, and unlike the regulation in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) and other cases cited by Cross-Petitioners, §§3795 and 5025 carry no criminal or civil penalties and may be enforced only through judicial action. As a result, concerns about "chilling" expression are not present here.[7]

Cross-Petitioners Trippet and Election Action argue that even if they lacked standing when they filed the complaint in September 1987, "they certainly had it by April 1988 when their ballot-argument statements were subjected to censorship proceedings." But those facts involve a different election and a different controversy from the one alleged in the complaint. And the law is clear that "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2141 (1992) (emphasis added in *Lujan*), quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989).[8]

In this case, the *Geary* complaint does not set forth facts establishing that Cross-Petitioners Trippet or

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[7] For additional reasons why third party standing is not appropriate here, we refer the Court to the City's May 24, 1993 letter to the Ninth Circuit on justiciability, reprinted as Appendix F to the Petition for Certiorari.

[8] Moreover, if standing does not exist when the complaint is filed, it does not matter if the controversy is of a kind capable of repetition yet evading review. *Nelsen v. King County*, 895 F.2d 1248, 1254 (9th Cir. 1990). That exception is limited to the doctrine of mootness. *Ibid.*

Election Action have standing as "speakers": The complaint does not allege that they ever submitted ballot arguments.

Indeed, the complaint does not even establish that Trippet or Election Action have standing as "listeners": Although the complaint alleges that 10 of the 12 original complainants are San Francisco residents and registered voters, that allegation is conspicuously absent with respect to Trippet. *See Geary* Complaint, ¶¶1 and 8, reprinted in the Cross-Petition, p. 2-A. Nor does the complaint allege that any member of Election Action is a registered voter in San Francisco. *Id.*, ¶7. Thus, the complaint fails even to assert that Trippet and Election Action have been injured "as registered voters who desire to read ballot arguments in their uncensored form," or in any other way. *Id.*, ¶17, Cross-Petition, p. 3-A. The burden of establishing standing is upon the complainants. *Renne*, 501 U.S. at 316.

Moreover, supplementation of the complaint at this point to allege such facts would not be permissible: A supplemented complaint *in 1994* alleging (1) that Trippet was a San Francisco voter; (2) that Election Action included registered San Francisco voters among its members; and (3) that Trippet or Election Action submitted ballot arguments in connection with the *June 1988* election would not set forth a live controversy, since a court could no longer grant any relief with respect to that election. *See Renne v. Geary*, 501 U.S. at 320-321; see pp. 16-17 *post*.

Thus, the supplementation could not be permitted because such a controversy would not be justiciable. *Ibid.*

This fact distinguishes *Matthews v. Diaz*, 426 U.S. 67, 76 (1976), cited by Cross-Petitioners.

2. The Controversy In Mark's Second Claim Is Moot.

The "Questions Presented" in the Cross-Petition do not raise any issue with respect to the second claim in *Mark v. Corwin*. Even if Mark *had* properly presented such a question to the Court, however, it should deny the Cross-Petition because the Ninth Circuit's decision was correct.

In finding Mark's second claim nonjusticiable, the Ninth Circuit plainly determined that the controversy was moot. The complaint alleged that pursuant to §10013.5, San Francisco obtained a court order deleting portions of a single complainant's candidate statement before the *November 1986* general election. But the complaint was filed nearly two years later, in *August 1988*. Thus, under *Renne*, the dispute was not live when Mark filed suit:

> While the mootness exception for disputes capable of repetition yet evading review has been applied in the election context, *see Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), that doctrine will not revive a dispute which became moot before the action commenced. 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' *O'Shea v. Littleton*, 484 U.S. 488, 495-496 (1974); *see Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Renne v. Geary, 501 U.S. at 320.

There were no "continuing, present adverse effects" in August 1988 from the judicial order to delete portions of a candidate's statement in connection with the long-completed election of November 1986. Thus, the Ninth Circuit correctly determined that the controversy alleged in Mark's second claim was not justiciable.

CONCLUSION

This case is not worthy of this Court's attention for at least two reasons.

First, the Court does not sit to issue "clarifications" of recent decisions. While the Cross-Petitioners are understandably unhappy about the result in *Renne*, certiorari is not granted to reiterate to unsuccessful parties why they did not succeed.

Second, the decision to dismiss the claims here as nonjusticiable is correct, following directly from this Court's ruling in *Renne*.

Unlike San Francisco's Petition for Certiorari, the Cross-Petition seeks review of judgments that follow directly from *Renne v. Geary*. The Cross-Petition should be denied.

DATED: June 13, 1994

Respectfully submitted,

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APPENDIX A

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July 21, 1993

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RE: *Geary v. Renne* (No. 89-15601)
Mark v. Corwin (No. 89-15603)

Dear Ms. Catterson:

In our letter to the court of May 24, 1993 ("the May 24 Letter"), appellants Louise H. Renne, City & County of San Francisco, *et al.* ("the City"), argued that none of the appellees remaining in *Geary v. Renne*, Court of Appeal No. 89-19691, have standing as "speakers." In answer to this argument, at the June 24, 1993 hearing in this case, counsel for appellees Bob Geary, *et al.*, cited portions of the clerk's record. Counsel stated that the cited documents show that appellees Sudi Trippet and Election Action submitted ballot arguments in connection with the June 1988 municipal election in San Francisco. Therefore, he argued, Ms. Trippet and Election Action have standing in this case as speakers.

At the hearing, Judge Rymer asked me for the City's response to this argument. I answered that without looking at the documents, I could not fully respond. Having now reviewed the documents and having reviewed the

case law, I am taking the liberty of submitting this response.

The *Geary* action was filed on September 11, 1987. *See Geary Complaint*, ER (cross-appeal) 1. Its first claim for relief alleges a single, live controversy. *Id.* at 3, ¶ 13; *see also* the May 24 Letter, p. 1 n.2. That controversy involves the judicial editing of ballot arguments in connection with the *November 1987* municipal election. ER (cross-appeal) 4, ¶ 15.

The documents newly cited by appellees relate to a totally separate controversy. They support the claim that in *April 1988*, appellee Trippet submitted ballot arguments on behalf of Grassroots/Election Action in connection with the *June 1988* municipal election.[1] In contrast, the controversy in *Geary* is over ballot arguments submitted and judicially edited nine months earlier.

The law is clear that "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2141 (1992) (emphasis added in *Lujan*) (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)); *see also Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990), and *Kuntz v. Rees*, 760 F.2d 926, 930 n.4 (9th Cir. 1985), *vacated on other grounds*, 785 F.2d 1410, 1411, *cert. denied*, 479 U.S. 916 (1986).[2] Moreover, if standing does not exist when the complaint is filed, it does not

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[1] We note that Grassroots/Election Action is not a party in this case; only Ms. Trippet and Election Action are.

[2] This rule does not mean that standing cannot be *lost* by the dismissal of the only plaintiffs who had standing at the time the complaint was filed. *See Nelsen v. King County*, 895 F.2d at

matter if the controversy is of a kind capable of repetition yet evading review. *Nelsen v. King County*, 895 F.2d at 1254. That exception is limited to the doctrine of mootness. *Ibid.*

In this case, the *Geary* complaint does not set forth facts establishing that appellants Trippet or Election Action have standing as "speakers": The complaint does not allege that they ever submitted ballot arguments. ER (cross-appeal) 3-4, ¶¶ 13 and 15. And supplementation of the complaint at this point to allege such facts would not be permissible: A supplemented complaint *in 1993* alleging that appellees Trippet and Election Action submitted ballot arguments before the *June 1988* election would not set forth a live controversy, since a court could no longer grant any relief with respect to that election. *See Renne v. Geary*, 111 S.Ct 2331, 2338 (1991) and the May 24 Letter, p. 5. Thus, the supplementation could not be permitted because such a controversy would not be justiciable. *Ibid.*; *see Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 296 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 332 (1991) (affirming denial of leave to amend "when any proposed amendment would be futile").

1250 (" 'The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).' " (quoting *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980)).

In sum, nothing in the record supports a claim that appellees Trippet and Election Action have standing as "speakers" in the controversy alleged in this action.

Respectfully submitted,

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